APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-4480

OMAR STRATMAN, et al.,
Plaintiffs-Appellants,

v.

JAMES G. WATT, Secretary of the Interior, et al.,
Defendants-Appellees.

OPINION

Argued and Submitted September 11, 1980.

Decided September 8, 1981.

Rehearing Denied November 27, 1981.

Roger E. Henderson, Anchorage, Alaska; Frederick L. Miller, Duncan, Weinberg & Miller, Washington, D.C., argued, for plaintiffs-appellants; Roger E. Henderson, Houston & Henderson, Anchorage, Alaska, on brief.

Peter Steenland, Washington, D.C., argued, for defendants-appellees; Dan A. Hensley, Anchorage, Alaska, on brief.

Appeal from the United States District court for the District of Alaska.

Before WALLACE, HUG and SCHROEDER, Circuit Judges.

SCHROEDER, Circuit Judge:

This is an action by various individuals to enjoin the granting of land patents to a Native corporation pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq.* Plaintiffs seek to demonstrate that the village corporation, Leisnoi, Inc. (Leisnoi), comprising the village of Woody Island, was not qualified as a Native village under the requirements of 43 U.S.C. § 1610(b)(3).[1] Defendants include the Secretary of the Interior and Leisnoi. A series of district court rulings resulted in the dismissal of all the plaintiffs' claims, and we partially remand.

At the time suit was filed, these plaintiffs could have been grouped into two categories. The first group of plaintiffs were individuals who occasionally used the land subject to patent for recreational purposes. The other plaintiffs, Stratman and Burton, held long-term federal grazing leases on land within the area subject to patent, and were also recreational users. We affirm the district court's dismissal of the claims of the first category of plaintiffs, and reverse and remand the dismissal of the remaining recreational claims of Stratman and Burton.

---

1 The action originally challenged two other Native villages, but those claims were separately litigated in another action, *see Koniag, Inc. v. Kleppe*, 405 F. Supp. 1360 (D.D.C. 1975), *aff'd in part and rev'd in part*, 580 F.2d 601 (D.C. Cir.), *cert. denied*, 439 U.S. 1052, 99 S.Ct. 733, 58 L.Ed.2d 712 (1978); those villages have subsequently been found by the Secretary to be ineligible.

The Alaska Native Claims Settlement Act (ANCSA), enacted in 1971, is intended to settle all aboriginal land claims by Natives and Native groups of Alaska. 43 U.S.C. § 1601; *Doyon, Ltd. v. Bristol Bay Native Corp.*, 569 F.2d 491, 493 (9th Cir.), *cert. denied*, 439 U.S. 954, 99 S.Ct. 352, 58 L.Ed.2d 345 (1978). ANCSA provides for accomplishment of that settlement through distribution of 40 million acres of land and payment of $962,500,000 to Native villages and regional corporations established pursuant to the Act's provisions. The Act lists many Native villages which are eligible for benefits, provided the Secretary determines they meet specified qualifications. 43 U.S.C. § 1610(b)(1) & (2). ANCSA also provides that villages other than villages specifically enumerated in the Act can qualify as recipient Native villages under certain conditions. 43 U.S.C. § 1610(b)(3).[2] Regulations promulgated by the Secretary of Interior provide for particular kinds of notice and a hearing to determine the validity of each unlisted village's application. 43 C.F.R. § 2651.2(a)(8)-(10).

---

2 43 U.S.C. § 1610(b)(3) provides:

> Native villages . . . shall be eligible for land and benefits under this Act . . . if the Secretary . . . determines that–
>
> (A) twenty-five or more Natives were residents of an established village on the 1970 census enumeration date as shown by the census of other evidence satisfactory to the secretary, who shall make findings of fact in each instance; and
>
> (B) the village is not of a modern and urban character, and a majority of the residents are Natives.

Woody Island is not listed in the Act as an eligible Native village. Application was made, however, for Woody Island to be declared an eligible village. After an investigation in 1973, Woody Island was found eligible to form a village corporation and determination of that eligibility was published in the Federal Register and several Alaska newspapers in accordance with Department of Interior regulations. None of the plaintiffs received actual notice of the Woody Island village application, however, and none filed objections or participated in any hearings held on the application, which was approved by the Secretary of Interior on March 18, 1975.

After learning of Woody Island's certification and the subsequent incorporation of Leisnoi to select lands for patent, plaintiffs filed this action pursuant to 28 U.S.C. § 1331 in July 1976, claiming that the government's investigation of the application, as required by 43 U.S.C. § 1610(b)(3) and 43 C.F.R. §§ 2651.2(a)(8) & 2651.2(b), had been insufficient and that the village did not qualify as a Native village. In a published opinion, the district court initially dismissed the claims of the recreational users, other than Stratman and Burton, for their failure to exhaust administrative remedies. However it permitted Stratman and Burton, because they had property interests in the land, to amend their complaint and to proceed, notwithstanding their failure to participate in any administrative proceedings. The court determined Stratman's and Burton's record interests entitled them to actual, rather than constructive notice of the certification application when administrative proceedings were pending. *Kodiak-Aleutian Chapter of Alaska conservation Soc'y v. Kleppe,* 423 F. Supp. 544 (D.Alaska 1976).

[1] At that point, faced with a full-scale trial of the Stratman-Burton claims, Leisnoi quitclaimed any interest in all land subject to Stratman's and Burton's leaseholds, thus mooting any claims based upon economic injury. Upon application of the defendants, the district court withdrew its prior ruling in favor of Stratman and Burton and dismissed their claims on the ground that there no longer existed any "case or controversy" within the meaning of article III of the United States Constitution.[3] The district court, significantly in our view, did not expressly consider the claims of Stratman and Burton as recreational users, apparently agreeing with the defendants that the quitclaim deed eliminated Stratman's and Burton's standing to challenge the certification.

Plaintiffs in this appeal ask us to review both the dismissal of the Stratman-Burton claims for lack of a case or controversy and the dismissal of the recreational users' claims for failure to exhaust administrative remedies.

With respect to Stratman and Burton, the issue of whether their claims were properly dismissed following the relinquishment by Leisnoi of any claim to the land in which they had economic interests. Its ruling was based upon the defendants' argument that

---

3 Stratman and Burton argue that their economic claims are not moot because other land selections by Leisnoi may threaten harm to their future economic interests in the area. We agree with the district court's ruling that any injury to these generalized economic interests is too speculative to create a case or controversy under article III. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100, 99 S.Ct. 1601, 1607-08, 60 L.Ed.2d 66 (1979); *Warth v. Seldin*, 422 U.S. 490, 498-99, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). *See also Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 42-44, 96 S.Ct. 1917, 1926-27, 48 L.Ed. 2d 450 (1976).

the plaintiffs lacked standing to pursue any claim of damage other than damage to economic interests, and thus could not pursue any remaining claim based on recreational interests.

[2] A threshold question for all the plaintiffs is therefore one of standing. In determining standing, we must consider both constitutional and prudential concerns. To satisfy the constitutional requirement that a "case or controversy" had been made out, the plaintiff must allege that he has suffered injury resulting from the defendant's allegedly illegal action. *Warth v. Seldin*, 422 U.S. 490, 498-99, 95 S.Ct. 2197, 2204-05, 45 L.Ed.2d 343 (1975). We have concluded that to satisfy this requirement "the plaintiffs must have alleged (a) a particularized injury (b) concretely and demonstrably resulting from defendant's action (c) which injury will be redressed by the remedy sought." *Bowker v. Morton*, 541 F.2d 1347, 1349 (9th Cir. 1976) (footnote omitted). *See also Sierra Club v. Andrus*, 610 F.2d 581, 592 (9th Cir. 1979).

[3] In dealing with standing to assert recreational interests, the Supreme Court in *Sierra Club v. Morton*, 405 U.S. 727, 734, 92 S.Ct. 1361, 1366, 31 L.Ed.2d 636 (1972) rejected the argument that only economic interests could provide standing, pointing out that "[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society . . . ." The plaintiffs allege they use the land subject to patent for a multitude of recreational purposes, including hunting, camping, picnicking and photography. This injury is sufficiently particularized; it is clear that the injury results from the defendants' action in removing the land from the public domain; the injury will be redressed by the enjoining of the defendants' removal of the land from the public domain. Thus, we conclude that the

plaintiffs have satisfied the constitutional requirements of standing.

Plaintiffs have also satisfied our prudential standing concerns. Plaintiffs' claims are not merely claims of generalized import, but seek to vindicate individual rights. In Addition, plaintiffs are raising their own legal interests, rather than the interests of third parties. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100, 99 S.Ct. 1601, 1607-08, 60 L.Ed.2d 66 (1979).

Finally, we are satisfied that plaintiffs' claim is within the zone of interests to be protected by the statute pursuant to which the claim arises. *Id.* at 100 n.6, 99 S.Ct. 1607-08 n.6, *citing Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1969). In considering whether that claim is within this zone of interests, we look to both the statute and the regulations promulgated under it. *See* B. Mezines, J. Stein & J. Gruff, 5 *Administrative Law* § 50.03 at 50-29 & 30 (1981) (look to statute to determine purpose and class to be protected); B. Schwartz, *Administrative Law* § 153 at 455 (1976). The regulations do not restrict the nature of protests which may be filed but rather provide that "any interested Party" may protest the village certification. 43 C.F.R. § 2651.2(a)(9). The Act itself indicates that Congress was well aware of the recreational interests of users of public land, and specifically provided for retention of public access easements in the lands selected by Native villages in order to preserve and protect recreational interests in the remaining federal lands. 43 U.S.C. § 1616(b). We are thus persuaded that recreational interests are within the zone protected by the statute and we reject the defendants' argument that the recreational claims should have been dismissed for lack of standing.

[4] We now turn to the district court's original determination that those plaintiffs (other than Stratman and Burton) whose interests were never more than recreational should have exhausted administrative remedies. The plaintiffs argue against imposition of such a requirement on the ground that they did not have actual notice of the village's application and thus could not have utilized administrative remedies. There are, however, a vast number of occasional users of this land and actual notice to all would have been impossible. Notice was provided by publication in the Federal Register and several Alaska newspapers. The district court correctly held that neither the government nor the village was required to give actual notice to all potential recreational users, and that the publication and other notice requirements set forth in the regulations, 43 C.F.R. § 2651.2(a)(8), did not deny due process to those whose only connection with the land was, at the time of published notice, simply that of recreational users. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317, 70 S.Ct. 652, 658, 94 L.Ed. 865 (1950); *North Am. Pharmacal, Inc. v. HEW*, 491 F.2d 546, 551-52 (8th Cir. 1973); 44 U.S.C. § 1508. Thus, while those with recreational interests have standing to challenge the agency action in question, they may not be relieved of the prerequisite of exhaustion of administrative remedies by virtue of lack of actual notice.

[5] Stratman and Burton, however, were not merely recreational users at the time of Woody Island's application. They had record interests in land which was subject to allotment and thus were potentially affected by the village certification at the time of the application. Given the ease with which such record interests could have been ascertained, we agree with the district court's original determination, 423 F. Supp.

at 547, that Stratman and Burton were entitled to actual notice of the proposed certification. *Schroeder v. City of New York*, 371 U.S. 208, 212-13, 83 S.Ct. 279, 282, 9 L.Ed.2d 255 (1962); *Walker v. City of Hutchison*, 352 U.S. 112, 116, 77 S.Ct. 200, 202, 1 L.Ed.2d 178 (1956); *Mullane v. Central Hanover Bank & Trust Co.*, *supra*, 339 U.S. at 314, 70 S.Ct. at 657. Since they did not receive such notice, they should not be barred by exhaustion requirements.[4] *Wills v. United States*, 384 F.2d 943 (9th Cir. 1967), *cert. denied*, 392 U.S. 908, 88 S.Ct. 2052, 20 L.Ed.2d 1366 (1968).

The difficult remaining question is the effect to be given Leisnoi's subsequent disclaimer of any interest in the property encompassed by Stratman's and Burton's leases. Had such a disclaimer occurred prior to the application for certification, their interests probably would not have differed form those of any recreational user. However, the disclaimer did not occur until after the administrative proceedings had concluded and hence after the opportunity to participate in the original determination had been lost. Since the administrative proceedings were not limited to the consideration of economic interests, a strong argument can be made that parties like Stratman and Burton, who were originally entitled to notice of the application and an opportunity to participate in the administrative hearings, and who were not given such notice, should be permitted to air all of their grievances, not merely economic grievances, in a judicial forum.

---

[4] Defendants argue that because the statute provides that the allotment of land to the Native village shall be subject to any valid existing rights, 43 U.S.C. § 1613(g), there need be no notice. We disagree, for those with leasehold interests should receive notice in order to protect the rights intended to be preserved by the statute.

[6, 7] Application of the doctrine of exhaustion of administrative remedies to the Stratman-Burton claims requires a balancing of factors, however. Judicially developed exhaustion requirements, which are necessarily susceptible to judicial refinement and modification, must be tailored to fit the peculiarities of an administrative system and the particular facts of each case. *Montgomery v. Rumsfeld*, 572 F.2d 250, 253 (9th Cir. 1978). A balancing analysis considers "both the interests of the agency in applying its expertise, correcting its own errors, making a proper record, enjoying appropriate independence of decision and maintaining an administrative process free from deliberate flouting, and the interests of private parties in finding adequate redress for their grievances." *Id.* *See also McKart v. United States*, 395 U.S. 185, 194-95, 89 S.Ct. 1657, 1662-63, 23 L.Ed.2d 194 (1969); *SEC v. G. C. George Sec., Inc.*, 637 F.2d 685, 688 n.4 (9th Cir. 1981). In this case, Stratman and Burton, who were originally entitled to notice and an opportunity to participate in the administrative proceedings, did not deliberately flout or seek a premature interruption of the administrative process. *Contrast McGee v. United States*, 402 U.S. 479, 488, 91 S.Ct. 1565, 1571, 29 L.Ed.2d 47 (1971) (deliberately side-stepped administrative proceedings); *Pattillo v. Schlesinger*, 625 F.2d 262, 266 (9th Cir. 1980) (Complete relief available through existing administrative procedures). The agency, on the other hand, undoubtedly had an interest and expertise in this basically factual dispute.

The district court, in finally disposing of this case on jurisdictional grounds, did not consider Stratman's and Burton's remaining recreational interests and therefore did not weigh the various alternatives which might be open to it in this regard. The judicial requirement of exhaustion of

administrative remedies is not mechanically applied and we believe the question should be considered initially by the district court; we remand for such consideration. *Sec. v. G.C. George Sec., Inc., supra,* 637 F.2d at 688 n.3; *Montgomery v. Rumsfeld, supra,* 572 F.2d at 254.

A remand is particularly appropriate here because the government, after the judgment was entered, represented to this Court that it intended to conduct further administrative inquiries into the qualifications of Woody Island. If such proceedings have occurred, plaintiffs may well have been given some opportunity to present administratively the matters which they sought to litigate in a judicial forum.[5] Any pending or intervening administrative action should be taken into account by the district court in determining what, if any, further judicial proceedings in connection with Stratman's and Burton's claims are warranted.

Affirmed in part; reversed and remanded in part.

---

5 Although plaintiffs' brief contains extensive discussion of claimed irregularities in the application, neither this Court nor the district court has considered the merits of their challenges. Defendants' motion to strike that portion of plaintiffs' brief is denied as moot.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 93-36006

FILED
December 5, 1994

Omar Stratman,

Plaintiff,

v.

Bruce Babbitt, Secretary of the Interior, Leisnoi Inc., Koniag, Inc.,

Defendants-Appellees.

MEMORANDUM*

Appeal from the United States District Court
for the District of Alaska
James A. von der Heydt, District Judge, Presiding

Argued and Submitted October 31, 1994
Seattle, Washington

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Before: WRIGHT, BEEZER and FERNANDEZ, Circuit Judges

Omar Stratman appeals the district court's denial of his motion to vacate a judgment of dismissal that had been entered upon Stratman's motion, brought in accordance with the terms of a settlement agreement signed by Stratman and Koniag, Inc. The dismissal was as to all defendants. Stratman also appeals the court's declination to alter that ruling after granting his motion for reconsideration. We reverse.

We will not reverse a district court's refusal of relief under Federal Rule of Civil Procedure 60(b)(6) in the absence of an abuse of discretion. United States v. RG&B Contractors, Inc., 21 F.3d 952, 954 (9th Cir. 1994). Moreover, as we have said, "[r]elief under Rule 60(b)(6) is extraordinary, especially where the judgment was rendered by consent." Washington v. Penwell, 700 F.2d 570, 574 (9th Cir. 1983); see also Jeff D. v. Andrus, 899 F.2d 753, 759 (9th Cir. 1989) (resolution of litigation through settlement is favored). Even so, when an agreement fails of its purpose in its entirety, that does raise an extraordinary circumstance. Cf. Keeling v. Sheet Metal Workers Int'l Ass'n, Local Union 162, 937 F.2d 408, 410 (9th Cir. 1991) (where party repudiated a settlement, the situation was extraordinary and setting aside dismissal was proper). This is just such a case.

Here, there was, as it turned out, a basic defect in the very inception and at the very core of the settlement agreement upon which the dismissal of this case was based. Unless Stratman made a deliberate choice to accept the risk of that defect, his agreement should not bind him and the dismissal of this action

should be set aside. When the district court failed to set aside the dismissal it did, in this extraordinary circumstance, abuse its discretion. Thus, we will first refer to the effect that the defect had upon the settlement agreement itself and will then discuss the deliberate choice issue.

A. The Agreement

The interpretation of the settlement agreement is subject to Alaska state law. Jeff D., 899 F.2d at 759. In Alaska, settlement agreements are interpreted according to the general principles of contract law. See Hayes v. Xerox Corp., 718 P.2d 929, 937 (Alaska 1986). Even a contract for a quitclaim deed can be rescinded if the parties who negotiated for the deed were operating under a material mutual mistake of fact. See Mantanuska Valley Bank v. Abernathy, 445 P.2d 235, 237-38 (Alaska 1968). A material mutual mistake of fact occurs when "'there was a mistake of both parties at the time of contracting as to a basic assumption on which the contract was made; the mistake had a material effect on the agreed exchange of performances, and the party seeking relief did not bear the risk of the mistake.'" Alaska Div. of Agric. v. Carpenter, 869 P.2d 1181, 1183 (Alaska 1994) (citation omitted).

It cannot be gainsaid that the first two requirements are met. It is clear that the settlement agreement negotiated by Koniag and Stratman contemplated that the surface rights to the subject land would be included, and that this was the contracting parties' intention. Koniag and Stratman believed at the time they entered into the settlement agreement that Leisnoi did not exist and that Koniag held all of the former Leisnoi's interests. If, in practical effect, Leisnoi did exist, both parties were operating under a material mistake of fact that went to the heart of the

contract they signed. Both parties believed that Koniag had the authority to represent Leisnoi's interest because Leisnoi was Koniag's predecessor. Leisnoi's interests in the disputed lands were the primary subject matter of the agreement; had the parties known that at that time it was impossible for them to negotiate a deal concerning those interests, they almost certainly never would have entered into the agreement.

The only remaining requirement is that Stratman did not bear the risk of the mistake. For the reasons discussed below, he did not. Accordingly, the settlement agreement was not enforceable. It is in just such extraordinary circumstances that Rule 60(b)(6) relief is warranted. See In re Pacific Far E. Lines Inc., 889 F.2d 242, 248, 250 (9th Cir. 1989); see also Keeling, 937 F.2d at 410.

The result we reach is not foreclosed by issue preclusion because the Alaska Supreme Court did not consider whether the settlement agreement was invalid. It merely held that on account of the doctrine of lis pendens, the agreement was not binding on Leisnoi. See Leisnoi, Inc. v. Stratman, 835 P.2d 1202, 1208-10 (Alaska 1992). The Alaska Supreme Court had no occasion to consider whether frustration of the settlement agreement warranted reopening Stratman's district court case.

B. Deliberate Choice

Rule 60(b)(6) relief is not available to remedy harm suffered as a result of a truly deliberate choice or strategy on the part of the moving party. Ackermann v. United States, 340 U.S. 193, 198, 71 S. Ct. 209, 211-12, 95 L. Ed. 207 (1950); Plotkin v. Pacific Tel. & Tel. Co., 688 F.2d 1291, 1293 (9th Cir. 1982).

In its 1982 settlement agreement with Stratman, Koniag warranted that "it will pursue its best efforts to achieve conveyance and patent of the lands, and that it will take no action to prevent conveyance." Stratman could not have anticipated that Koniag would enter into a settlement agreement in the demerger litigation that would declare the merger "void ab initio." That agreement jeopardized the surface-estate conveyance. Despite the agreement it had negotiated with Stratman, Koniag acquiesced in the use of the "void ab initio" language at the request of the shareholder in the demerger litigation. Thus, Koniag helped create the very circumstance that frustrated the 1982 settlement agreement.

It is not significant for the purposes of "deliberate choice" analysis that Stratman agreed to accept a quitclaim deed. The agreement clearly contemplated that the surface estate was part of the deal. Koniag's attorney insisted on the use of a quitclaim deed because "he did not want Koniag to be obligated to convey a greater interest in the land than it received from the U.S. government." The record does not indicate that the attorney's concern stemmed from any worry that Koniag might have only subsurface rights to convey as a result of a demerger, but rather from a concern that Leisnoi might not have taken all of the necessary procedural steps to allow the United States to perfect the conveyance, or that some other procedural problems might arise. If the attorney did have the former concern, nothing suggests that he made it known to Stratman.

On balance, the district court abused its discretion in finding that Stratman made a deliberate choice to ignore the risk that Leisnoi one day might not be bound to make the conveyance. Although the record

shows that Stratman knew of the pending demerger litigation, he could not have known that Koniag would agree to declare the merger "void ab initio" and that that would enable Leisnoi to claim the benefits but eschew the burdens of the settlement agreement. As it is, Leisnoi's position depends upon a much later opinion of the Alaska Supreme Court. That, in turn, elicited a vigorous dissent which asserted that the court had greatly changed the law itself. See Leisnoi, 835 P.2d at 1211 (Moore, J. , dissenting). Thus, no deliberate choice was made.

C. Indispensable Party

Assuming arguendo that Koniag is an indispensable party to this action, its settlement agreement with Stratman, which would apparently require Koniag's dismissal as a defendant were this case to proceed, does not affect the reopening of the action under Federal Rule of Civil Procedure 19. Rule 19 dictates only that indispensable parties be joined in an action. Koniag has been a defendant in this suit since January 1977. Nothing prevents an indispensable-party defendant, once joined, from settling with the plaintiff.

By its very terms, Rule 19(b)'s considerations of "equity and good conscience" as to whether an action should go forward absent an indispensable party come into play only "whenever joinder [is] not feasible." Here, joinder is not only feasible, it was accomplished seventeen years ago.

D. Timeliness of the Rule 60(b)(6) Motion

A Rule 60(b)(6) motion must be brought "within a reasonable time." "What constitutes a reasonable time 'depends on the facts of each case.'" Pacific Far

East, 889 F.2d at 249 (citation omitted). The primary considerations in determining whether a motion to vacate a dismissal was brought within a reasonable time are whether the moving party had good reason for not acting sooner and whether the adverse party was prejudiced by the delay. Id. The district court, without discussion, found that the motion to vacate the dismissal was timely made. We agree.

"In the usual course upon repudiation of a settlement agreement, the frustrated party may sue anew for breach of the agreement and may not, as here, reopen the underlying litigation after dismissal." Keeling, 937 F.2d at 410.

Stratman chose to follow the "usual course" and seek specific performance of the settlement agreement in state court. By not also seeking to reopen the district court litigation at that time, Stratman avoided expending judicial as well as his own resources on litigation that might later prove unnecessary -- or even, depending on its outcome, incompatible with the relief he sought in the specific performance action.[2]

Leisnoi and the Secretary claim that there will be prejudice to Leisnoi's shareholders if the dismissal is set aside. We fail to discern that. Any harm suffered by Leisnoi will occur either because it seeks to enjoy the settlement agreement's benefits without paying for them or because its claim to the land was seriously defective in the first place.

---

2 At oral argument appellees conceded that the seven and a half months between the decision in Leisnoi and the bringing of the Rule 60(b)(6) motion was not an unreasonable delay.

Conclusion

After Stratman brought this action against appellees, the attorney defending it believed that Stratman had an excellent (90%) chance of success. Stratman, however, did what we encourage parties to do: he settled the action with the only entity that could then negotiate a settlement with him -- Koniag. Now Leisnoi seeks to secure a Panglossian result for itself. In its best of all possible worlds everything will be for the best as far as it is concerned. Stratman will be held to his agreement with Koniag, but Leisnoi will have no obligations. We understand the desire, but the law does not allow for its gratification.

A material mutual mistake of fact existed at the time Stratman and Koniag negotiated the 1982 settlement agreement. Rule 60(b)(6) relief is warranted when there has been complete frustration of a settlement agreement, and the district court abused its discretion in declining to reopen Stratman's action under these extraordinary circumstances. We therefore reverse the district court's order denying Stratman's motion for Rule 60(b)(6) relief and remand to the district court with instructions that it vacate the judgment of dismissal and reopen Stratman's decertification litigation.[6]

REVERSED AND REMANDED.

---

6 We deny the Secretary's motion to strike the reply brief or parts thereof.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Civil No. A76-132

FILED
December 7, 1976

The KODIAK-ALEUTIAN CHAPTER OF the ALASKA CONSERVATION SOCIETY et al., Plaintiffs
v.
Thomas S. KLEPPE, Secretary of the Interior, Defendant.
[423 F.Supp. 544]

MEMORANDUM AND ORDER

VON DER HEYDT, Chief Judge.

THIS CAUSE comes before the court on defendant's motion to dismiss. the case involves land allotments pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 *et seq*. Certain allotments were tentatively made to various village corporations and a Regional Corporation. Plaintiffs who hold varying interests in these lands seek to set aside these allotments.

The motion is based on three grounds. The first basis is that plaintiffs have failed to join an indispensable party. Due to the nature of the relief sought the court finds that Koniag, Inc. and the various village corporations which have claims to this land are

necessary parties. Fed.R.Civ.Pro. 19(a). Rather than to dismiss the case, however, the court orders the plaintiffs to file an amended complaint naming these parties as defendants or pleading reasons why they are not joined. Fed.R.Civ.Proc. 19(a), (c); *English v. Seaboard Coast Line Rry, Co.*, 465 F.2d 43, 47-48 (5th Cir. 1972).

The second ground for dismissal is that the complaint has failed particularly to allege the circumstances constituting fraud. Fed.R.Civ.Proc. 9(b). This contention is well taken to the extent that the circumstances constituting fraud have not been particularly alleged. Plaintiffs assert, however, that the fraud alleged in the original complaint is mere surplusage. In view of this fact, rather than dismissal, the court will give the plaintiffs two options. If the fraud allegation is mere surplusage the plaintiffs may eliminate it from their amended complaint. Fed.R.Civ.Proc. 12(f). If the allegation is essential plaintiffs will comply with Rule 9(b) in their amended complaint.

The final basis for the motion is failure of the plaintiffs to exhaust their administrative remedies. Plaintiffs initially objected that this ground was not properly raised in a motion to dismiss. Although the court disagrees with this assertion, *see Van Horn v. State Farm Mut. Auto Ins. Co.*, 283 F. Sup. 260 (E.D. Mich. 1966), aff'd 6 Cir., 391 F.2d 910; 5 Wright & Miller, *Federal Practice and Procedure*, § 1360, p. 101 (1975 pocket part), it is not necessary to pass upon the issue. The motion to dismiss on this basis relied on material outside of the pleadings and the court issued an order stating that this was considered a motion for summary judgment. Fed.R.Civ.Proc. 12(b). In accordance with Rule 12(b) the parties were allowed

additional time to present material pertinent to the motion.

Oral argument was heard on the motion prior to the court's order allowing additional briefing and plaintiffs have requested additional arguments on the exhaustion issue. This request is denied in order to expedite the business of the court. Local Rule 5(C)(1).

In the supplemental memoranda the parties concur in the assertion that no need existed to exhaust administrative remedies with respect to two of the three villages. This is because of the fact that these parties' interests were protected by others in the administrative process and that plaintiffs informally presented evidence at the administrative hearings. The motion, therefore, if not withdrawn by the defendant, is denied.

With respect to the third village (Woody Island), plaintiffs do not maintain that they have exhausted their administrative remedies. They admit that they did not present evidence to the administrative bodies passing upon the land claims as they were entitled to do. *See* 43 CFR § 2651.2(9). If this were the sole point of contention on this issue the motion would be well taken as it is established that one cannot exhaust his administrative remedies by default. *Olinger v. Partridge*, 196 F.2d 986, 987 (9th Cir. 1952); *Kuhn v. Nat. Assoc. of Letter Carriers*, 528 F.2d 767, 771 (8th Cir. 1976).

In regard to the determination of eligibility of the third village the plaintiffs mount various attacks. Their central contention, however, is that their failure to exhaust administrative remedies was due to insufficient notice of the administrative hearing. The notice requirements are set out in 43 CFR § 2651.2.

The notice of the proposed action given to "interested parties" other than the villages, the Regional Corporations and the State of Alaska, is publication in the *Federal Register* and one or more newspapers of general circulation in Alaska. 43 CFR § 2651.2(8). Protests are allowed by any interested party if received within 30 days of publication in the *Federal Register*. 43 CFR § 2651.2(9).

The due process clause of the Fourteenth Amendment requires "notice reasonably calculated under the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Schroeder v. City of New York*, 371 U.S. 208, 211, 83 S.Ct. 279, 282, 9 L.Ed.2d 255 (1962). In *Schroeder*, much like the present case, notice of land condemnation that was published in two county newspapers was held to be constitutionally insufficient. An essential element of the holding was that the name and address of the person affected by the action was known or easily ascertainable. In the present case two of the plaintiffs, Stratman and Burton, were holders of federal grazing leases on the land selected by the villages. As to these two plaintiffs who held valuable property rights and whose names and addresses were known or could easily have been ascertained the notice provisions of the regulations were legally insufficient under the due process clause. *Schroeder v. City of N.Y., supra; See also* 44 U.S.C. § 1508. It was, therefore, unnecessary for them to exhaust their administrative remedies. *Piccone v. U.S.*, 407 F.2d 866, 869, 186 Ct.Cl. 752 (1969).

The other plaintiffs, however, fall within a different category. The Alaska Conservation Society through its members and the other individual plaintiffs appear to be interested in the property only as

occasional users. *See Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). As to these plaintiffs the publication in the *Federal Register* was sufficient to comport with the due process as their names and addresses were not known or readily ascertainable. 44 U.S.C. § 1508; *Bank of Commerce v. Bd. of Governors of Fed. Res. System,*, 513 F.2d 164, 166-67 (10th Cir. 1975). These plaintiffs have defaulted on their obligation to exhaust administrative remedies and are not precluded from bringing an action relating to this third village. *Olinger v. Partridge, supra; Kuhn v. Nat. Assoc. of Letter Carriers, supra.*

The additional challenge made to the regulation which places the burden of proof on the protesting party, 43 CFR § 2651.2(9), has not been considered as no party has yet suffered from its operation. The court finds it doubtful that this regulation violates due process but that issue is reserved for later consideration.

Accordingly IT IS ORDERED:

1. THAT defendant's motion to dismiss is partially granted and partially denied in conformity with this opinion.

2. THAT plaintiffs file an amended complaint in conformity with this opinion within 30 days of the date of this order.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. A76-132 Civil

FILED
October 16, 1978

Omar Stratman, et al,

Plaintiffs,

v.

CECIL D. ANDRUS, et al,

Defendants.

MEMORANDUM AND ORDER

THIS CAUSE comes before the court on non-government defendants' motion to dismiss. The motion is based on the contention that subsequent actions by the defendants have eliminated any controversy that involves the rights of the plaintiffs.

The amended complaint filed on January 5, 1977, challenged the eligibility of three native villages to receive land under the Alaska Native Claims Settlement Act, 43 U.S.C.A. § 1610(b)(3)(Supp. 1978). The complaint is based on grazing leases issued by the United States on lands tentatively selected by the village corporations. It is the contention of the

plaintiffs that if patents are issued to these villages, rights to the leases created under state law would be terminated (Paragraph VI). The plaintiffs also alleged that an interest in a slaughter-house facility selected by defendant Leisnoi, Inc. (Woody Island) would be terminated if the land were patented to the village corporation (Paragraph VII).

This court previously held that plaintiffs Stratman and Burton were not required to exhaust administrative remedies because they had not received adequate notice of the hearings held on the eligibility of the village corporations at issue in this case. *Kodiak-Aleutian Chapter, Alaska Wildlife Federation v. Kleppe*, 423 F. Supp. 544 (D. Alaska 1976). This court's dismissed [sic] the other plaintiffs for failing to exhaust administrative remedies after notice which was held adequate considering the interest in the land which those "occasional users" alleged.

Two of the villages, Anton Larson Bay and Bells Flats, have not been certified by the Secretary as eligible for land distributions. *See Koniag, Inc. v. Kleppe*, 405 F. Supp. 1360 (D.D.C. 1975), affirmed in part and reversed in part, *Koniag, Inc. , the Village of Uyak v. Andrus*, No. 76-1325 (D.C. Cir., April 28, 1978). Since any litigation over the eligibility of these villages would be premature before a final determination by the Secretary, the only controversy that could possibly remain in existence in this case is between the village corporation for Woody Island, Leisnoi, Inc., and plaintiffs Stratman and Burton.

The exercise of judicial power under Article III of the Constitution is not created by issues of public interest but depends on the existence of a constitutional "case or controversy." A federal court has neither the power to render advisory opinions nor

"to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). A real and substantial controversy must be in existence at all stages of the litigation and not merely at the time the complaint is filed. *Steffel v. Thompson*, 415 U.S. 452, 459, n.10 (1974). A case may be rendered moot by an act of one of the parties which dissolves the controversy. *Preiser v. Newkirk*, 422 U.S. 395 (1975); *A.L. Mechling Barge Lines v. United States*, 368 U.S. 324 (1961).

The affidavit of Karl Armstrong, President and Chairman of the Board of Leisnoi, Inc. indicates that Leisnoi, Inc. has relinquished all claims to the land involving the grazing leases issued by the BLM, No. A-010892 and A-011253.[1] Leisnoi has also conveyed to the Kodiak Island Borough by quitclaim all interest it has in the land on which the slaughter-house facility is located. This property has previously been quitclaimed to Kodiak Livestock Cooperative, Inc., by the Kodiak Borough. Kodiak Livestock is the business through which Stratman and Burton claim an interest in this property.[2] This series of relinquishments and the quitclaim removes all dispute between Stratman and Burton and Leisnoi, Inc. over the land selections involving the federal grazing leases and the slaughter-house. Stratman and Burton claim that a dispute still exists because other land selections by Leisnoi injure

---

1 As the defendants have correctly pointed out these leases are issued to Kodiak Cattle Company and Northland Ranches, Inc. Exhibits B and C. Accordingly, the complaint appears to be in violation of the real party in interest rules contained in Fed. R. Civ. P. 17(a).

2 As noted above the fact that the slaughter-house is actually owned by Kodiak Livestock Cooperative, Inc. appears to place the complaint in violation of Rule 17.

their rights in existing state grazing leases and otherwise threaten their future economic interests in the area.

First, any injury to the generalized economic interests alleged by Stratman and Burton in their affidavits is much too speculative to create a case or controversy under Article III. As the Court noted in *United States v. SCRAP*, 412 U.S. 669, 688-89 (1973), "pleading must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has been or will in fact be preceptibly harmed by the challenged agency action."

Second, neither this generalized economic harm nor the injury to the state leases was alleged in the complaint. The court disapproves of the effort to revive a dead controversy by pointing to a new one that enters the litigation for the first time at this late date.

Third, even if these state leases were relevant to the present action, the Alaska Native Claims Settlement Act, 43 U.S.C.A. § 1613(g) (Supp. 1978), protects all valid existing rights and makes the lands patented to the Natives subject to these rights. The Act provides:

> "Where prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement (including a lease issued under 6(g) of the Alaska Statehood Act) has been issued . . . the patent shall contain provisions making it subject to the lease contract . . .

In Order No. 3016 (dated Dec. 14, 1977), Secretary of Interior Andrus has adopted a construction of this section which includes state leases.

It is not necessary for the court to decide at this time whether such a construction is correct, but until the Secretary changes his policy, or a native corporation or village challenges this policy, and does not respect such state leases as valid existing rights, the plaintiffs will not be injured by the transfer of these selections to Leisnoi. Until such time as such injury can be alleged, there is no case or controversy under Article III between the plaintiffs Stratman and Burton and Leisnoi that would allow this court to determine its eligibility as a village or the validity of its land selections.

The other contentions of the plaintiffs have no merit and have been dealt with in this court's previous memoranda.

Accordingly, IT IS ORDERED:

1. THAT non-governmental defendants' motion to dismiss is granted, and the cause is dismissed.

2. THAT the Clerk may prepare an appropriate judgment form.

DATED at Anchorage, Alaska, this 16th day of October, 1978.

/s/ James A. von der Heydt
James A. von der Heydt
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. A76-132 Civil

FILED
March 15, 1979

Omar Stratman, Toni Burton
John Murray, Michael Devers,
James Schauff, and Brian Shafford,

Plaintiffs,

v.

CECIL D. ANDRUS, Secretary of the Interior, ANTON LARSON, INC., BELLS FLATS NATIVES, INC., LEISNOI, INC., and KONIAG, INC., REGIONAL NATIVE CORPORATION,

Defendants.

ORDER

The motion of the federal defendant for an order indicating if this Court will grant the federal defendant's motion for relief from judgment having come before this Court, and it appearing after considering the issues that this Court will enter an order granting federal defendant's motion for relief from judgment if a remand of this action is ordered by the Court of Appeals,

IT IS ORDERED that federal defendant's motion for an order indicating if this Court will grant federal defendant's motion for relief from judgment is hereby granted;

and this Court hereby indicates that it will grant federal defendant's motion for relief from judgment.

DATED this 15th day of March, 1979, at Anchorage, Alaska.

/s/ James A. von der Heydt
Judge James A. von der Heydt
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. A76-132 Civil

FILED
July 3, 1979

Omar Stratman, Toni Burton
John Murray, Michael Devers,
James Schauff, and Brian Shafford,

Plaintiffs,

v.

CECIL D. ANDRUS, Secretary of the Interior, ANTON LARSON, INC., BELLS FLATS NATIVES, INC., LEISNOI, INC., and KONIAG, INC., REGIONAL NATIVE CORPORATION,

Defendants.

MEMORANDUM AND ORDER

THIS CAUSE comes before the court on remand from the Ninth Circuit Court of Appeals for the purpose of considering defendant's motion for relief from judgment under Rule 60(b), Fed.R.Civ. P. In this cause the plaintiffs, Burton and Stratman, challenge the eligibility of the Native village of Woody Island to make certain selections under the Alaska Native Claims Settlement Act, (ANCSA), 43 U.S.C. § 1601-28 (1976).

In a previous memorandum and order of this court it was held that plaintiffs Stratman and Burton, who are holders of federal grazing leases on the land selected by the village corporation, Leisnoi, Inc., were not required to exhaust their remedies in previous administrative proceedings to determine the eligibility of the village of Woody Island. *Kodiak-Aleutian Chapter of the Alaska Conservation Society v. Kleppe*, 423 F. Supp. 544 (D. Alaska 1976). That decision was based on the rationale that the grazing leases held by Stratman and Burton were "valuable property rights" and therefore they had received inadequate notice of the administrative proceeding that determined the eligibility of the village of Woody Island and its corporation, Leisnoi, Inc. 423 F. Supp. at 547.

In an unpublished memorandum and order of October 16, 1978, this court held that the claims of Stratman and Burton were moot because Leisnoi, Inc. had relinquished all claims to the land involving the federal grazing leases and a slaughter-house facility in which the plaintiffs hold an interest. The court accordingly granted the non-government defendants' motion to dismiss and entered final judgment dismissing the entire case as moot.

The government defendants in their motion for relief from judgment request this court to vacate that portion of the court's previous opinion that would allow parties in the position of Stratman and Burton to collaterally attack an administrative determination of Native village eligibility. The government correctly contends that the plaintiffs could allege no injury to their property interest because the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(g) protects all valid existing rights and makes the land patented to the Natives subject to those rights. The Act provides:

> Where prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement (including a lease issued under 6(g) of the Alaska Statehood Act) has been issued . . . the patent shall contain provisions making it subject to the lease, contract . . ."

43 U.S.C. § 1613(g). This provision means that whatever property interests were held by Stratman and Burton, including the federal grazing leases, could not be injured by Woody Island's eligibility and the selection of land by its village corporation. Any patents issued to the village corporation would have to protect the property interests upon which the court had previously based its decision on exhaustion of administrative remedies.

Federal courts have neither the power to render advisory opinions nor "to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). In view of the fact that Stratman and Burton could not have been injured by the village selections and the serious implications of allowing a collateral attack on Native village eligibility under ANCSA, this court must vacate that portion of the memorandum and order of December 7, 1976, that allowed the plaintiffs to litigate Woody Island's eligibility.

Accordingly IT IS ORDERED:

1. THAT defendant's motion for relief from judgment is granted.

2. THAT portion of the court's memorandum and order of December 7, 1976, denying defendants'

motion to dismiss as to plaintiffs Stratman and Burton is vacated.

3. The claims of Stratman and Burton are dismissed.

4. The final judgment entered by this court on October 16, 1978, is reinstated in conformity with this memorandum.

DATED at Anchorage, Alaska, this second day of July, 1979.

/s/ James A. von der Heydt
James A. von der Heydt
UNITED STATES DISTRICT JUDGE

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. A76-132 Civil

FILED
August 18, 1993

)mar Stratman, et al.

Plaintiff,

v.

Bruce Babbitt, et al.

Defendants-Appellees.

MEMORANDUM AND ORDER

I. INTRODUCTION.

This cause comes before the court on motion to vacate dismissal and reopen case, filed March 5, 1993 (Docket No. 117), by plaintiff Omar Stratman. Defendants Koniag, Inc., Leisnoi, Inc., and Bruce Babbitt, Secretary of the Interior, filed oppositions to plaintiff's motion. The court heard oral argument on August 12, 1993 at Anchorage. For the reasons outlined below, plaintiff's motion is denied.

II. BACKGROUND.

Many years, pleadings, arguments and agreements have transpired since the inception of this case. The case chronology was fully laid out in unabridged form by the Alaska Supreme Court in its opinion in Leisnoi, Inc. v. Stratman, 835 P.2d 1202 (Alaska 1992). Other salient facets and subtle interstices have been supplied by the parties in the most recent pleadings. There appears to be little disagreement among the parties regarding the sequence of events leading up to the present motion. A similar characteristic in each of the pleadings is the differing interpretation of those events. Finding no need to be repetitious, the court will rely on the background information supplied by the parties as well as the statement outlined in the Alaska Supreme Court's decision.

III. DISCUSSION.

A. Standard for Vacating Dismissal & Reopening Case.

A court may, in the exercise of its discretion, grant a motion for relief from judgment under Fed. R. Civ. P. 60(b)(6). United States v. Sparks, 685 F.2d 1128, 1130 (9th Cir. 1982). Relief is granted under the rule only in extraordinary circumstances. Ackermann v. United States, 340 U.S. 193, 71 S. Ct. 209 (1950); Keeling v. Sheet Metal Workers Int'l Assn. Local Union 162, 937 F.2d 408, 410 (9th Cir. 1991). The rule does not contemplate relief from alleged harm suffered as a result of calculated, deliberate choices or strategies. Ackermann, 340 U.S. at 198; Plotkin v. Pacific Telephone and Telegraph Co., 688 F.2d 1291, 1293 (9th Cir. 1982).

B. Plaintiff's Motion.

1. Relief Under Fed. R. Civ. P. 60(b)(6).

Plaintiff's final reply synthesizes his contentions as to why, under Fed. R. Civ. P. 60(b)(6), relief is warranted. The three reasons advanced by plaintiff for vacating the dismissal and reopening the case are (1) because the settlement agreement was repudiated by Leisnoi; (2) because the settlement agreement was judicially determined to be invalid as to Leisnoi; and (3) because Koniag had no authority to enter the stipulated dismissal on Leisnoi's behalf. The court will address these arguments in turn.

a. Leisnoi Repudiated the Settlement Agreement.

At the time the settlement agreement was signed, Leisnoi, Inc. had merged with Koniag, Inc. Leisnoi, Inc. did not exist as a corporate entity. Leisnoi could not have legally signed the settlement agreement on its own behalf. More importantly, while the settlement negotiations were in progress, a Leisnoi shareholder had filed a demerger action, seeking to set aside the merger of Leisnoi with Koniag. Even more significantly, plaintiff was aware that Leisnoi was attempting to halt the settlement agreement. That attempt was denied by the court and plaintiff proceeded to sign the settlement agreement. By the terms of the agreement, plaintiff was willing to accept a quitclaim deed from Koniag, Inc. for whatever rights to whatever property Koniag had to transfer to plaintiff. Further, as part of the settlement agreement, plaintiff agreed to dismiss the decertification action.

On balance, plaintiff's request for relief for the above reason does weigh in favor of vacating the

dismissal and reopening the case. Plaintiff argues that Leisnoi was a party to the agreement because Leisnoi would have been bound by the agreement but for the subsequent demerger settlement agreement and the Alaska Supreme Court's interpretation of the doctrine of lis pendens. The Alaska Supreme Court held that the merger of Koniag and Leisnoi was void ab initio. Because the merger never occurred, Koniag could not have signed on behalf of Lesinoi. Leisnoi was not a signatory to plaintiff's settlement agreement with Koniag. It is not possible to repudiate a document one did not sign. Because Leisnoi did not sign the settlement agreement, it is inaccurate to content that Leisnoi repudiated the agreement.

b. Settlement Agreement Invalid.

Plaintiff also argues that the Alaska Supreme Court determined that the settlement agreement was unenforceable against Leisnoi. What the court did not determine, continues plaintiff, was not that Leisnoi was not a party to it, or that no agreement was in existence. What the court did determine was that Leisnoi could not be bound by the settlement agreement because the merger was void ab initio. Thus, plaintiff concludes, at the time the decertification settlement agreement was signed, Leisnoi was clearly a party to the agreement.

Plaintiff further argues that the issue before the Alaska Supreme Court was whether the agreement was specifically enforceable against Leisnoi. What the court did not address was whether Leisnoi repudiated the agreement within the meaning of Fed. R. Civ. P. 60(b)(6).

Assuming plaintiff's interpretation of the Alaska Supreme Court decision correct, there was no need for

the court to consider whether Leisnoi repudiated the agreement. It would have made little sense for the court, having determined the agreement was unenforceable against Leisnoi, to decide whether Leisnoi repudiated an agreement which could not be enforced against it. Nor does it make further sense for this court to decide whether Leisnoi repudiated an agreement which has been judicially determined to be unenforceable against it.

c. No Authority to Enter Stipulated Dismissal.

Plaintiff's third argument for warranting Fed. R. Civ.. P. 60(b)(6) relief is that Koniag had no authority to enter into a stipulated dismissal on Leisnoi's behalf. Plaintiff submits that if Leisnoi was never bound by the settlement agreement because Koniag had no authority to enter it on Leisnoi's behalf, then Koniag, likewise, would have no authority to stipulate to the dismissal of Leisnoi.

The stipulated dismissal of this case was by order of the Ninth Circuit on motion from plaintiff. Federal Rule of Civil Procedure 42(a) provides that "[a]n appeal may be dismissed on motion of the appellant upon such terms as may be agreed upon by the parties or fixed by the court." Plaintiff moved to dismiss the case and agreed to terms of dismissal by signing the settlement agreement. The rule relied upon by plaintiff, Fed. R. Civ. P. 41(a)(1)(ii), is not applicable.

2. Failure of Settlement Not a Deliberate Choice.

Plaintiff submits that he did not make a deliberate and conscious choice to enter a settlement

agreement that was subject to invalidation. This argument belies the fact that plaintiff was aware of the attempt by the Leisnoi stockholders to prevent Koniag and plaintiff from signing the agreement. In the state court action, Judge Hunt found that plaintiff had knowledge that if the demerger was granted, Leisnoi would be reconstituted as a separate corporation and its land selection rights would return to it. Nothing was included in the settlement agreement to cover the contingency of the demerger. It appears that plaintiff appreciated the risks, was aware of the demerger litigation, decided to use a quitclaim deed and proceed to enter the settlement agreement.

3. Other Arguments.

There are several other counter arguments which are raised by defendants in the oppositions filed which plaintiff addresses in his reply. It is submitted by defendants Leisnoi and Koniag that plaintiff's motion is not timely. The court finds that under Fed. R. Civ. P. 60(b)(6) and the sequence of this litigation, plaintiff brought the motion within a reasonable time. Because the issue of intervening rights goes to the issue of whether the motion was brought within a reasonable period of time, the court does not reach the issue of intervening rights.

Defendants argue that plaintiff's motion to vacate dismissal and reopen case should not be granted because plaintiff could not prevail on the merits of his claim. Plaintiff counters that the standard posed by defendants is only required on a motion to grant relief from a default judgment, where default was attributable to the movant's wrongful conduct. Plaintiff contrasts this case, where he argues there was a repudiation of the settlement agreement or the unauthorized stipulation of dismissal which was

attributable to defendant's wrongful conduct. The court, however, decided above there was no repudiation nor unauthorized stipulation of dismissal.

In light of the above discussion, the briefing submitted by the parties and the arguments made during oral argument, the court does not reach plaintiff's contentions to defendants' arguments why no meritorious defense is made by plaintiff to reopen the case. However, extraordinary circumstances do not exist which would favor a reopening of this case.

IV. ORDER

Accordingly, IT IS ORDERED THAT plaintiff's motion to vacate dismissal and reopen case is DENIED.

DATED at Anchorage, Alaska, this 17th day of August, 1993.

/s/ James A. von der Heydt
United States District Judge

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 93-36006

FILED
February 22, 1995

OMAR STRATMAN, et al.,
Plaintiffs-Appellants,

v.

BRUCE BABBITT, Secretary of the Interior, et al.,
Defendants-Appellees.

ORDER

Before: Wright, Beezer, and Fernandez, Circuit Judges

The panel has unanimously voted to deny the petition of appellant, Leisnoi, Inc., for rehearing and has unanimously voted to deny the petition of appellant, Koniag, Inc., for reconsideration. The suggestions for rehearing en banc, filed by Leisnoi, Inc., and Koniag, Inc., were circulated to the active judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing is DENIED, the petition for reconsideration is DENIED, and the suggestions for rehearing en banc are REJECTED.

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-4480

FILED
November 27, 1981

OMAR STRATMAN, et al.,
Plaintiffs-Appellants,

v.

JAMES G. WATT, Secretary of the Interior, et al.,
Defendants-Appellees.

ORDER

Before: Wallace, Hug, and Schroeder, Circuit Judges

The Panel as constituted in the above case has voted to deny the petition for rehearing.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. A76-132 Civil

OMAR STRATMAN, TONI BURTON, JOHN MURRAY, MICHAEL DEVERS, JAMES SCHAUFF, AND BRIAN SHAFFORD,

Plaintiffs,

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ANTON LARSEN, INC., BELLS FLATS NATIVES, INC., LEISNOI, INC., AND KONIAG, INC., REGIONAL NATIVE CORPORATION,

Defendants.

MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT

Federal defendant, Cecil D. Andrus, Secretary of the Interior, respectfully petitions the Court to clarify the extent to which the Memorandum and Order entered in the above-captioned case on October 16, 1978, modifies the earlier Memorandum and Order filed on December 7, 1976, *sub nom, Kodiak-Aleutian Chapter of the Alaska Conservation Society v. Kleppe*,

423 F.Supp. 544 (D.Ak. 1976). Federal defendant seeks relief from judgment in this case, pursuant to Civil Rule 60(b), with respect to those determinations presented in the Court's 1976 Memorandum and Order which were superseded by the Court's subsequent Memorandum and Order, filed in 1978.

In its 1976 Memorandum and Order, the Court held, *inter alia*, that holders of federal grazing leases on lands selected by an unlisted village under the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601 *et seq.*, would be permitted to challenge the administrative determination of the village's eligibility without having exhausted their administrative remedies. 423 F.Supp. at 527. Relying on *Schroeder v. City of New York*, 371 U.S. 208, 211 (1962), the Court ruled that since the leaseholders possessed "valuable property rights" with respect to the selected land, and since the names and addresses of the leaseholders were known or could have easily been ascertained, notice by publication pursuant to 43 CFR § 2651.2 of an administrative contest procedure relating to the government's determination of village eligibility was constitutionally inadequate with respect to the leaseholders. The Court distinguished the process due the leaseholders from that due the other plaintiffs, who, as members of a local conservation organization, were only "occasional users" of the selected land, and whose names and addresses were not known or readily ascertainable. The latter plaintiffs were held to have defaulted on their obligation to pursue their administrative remedies, and were dismissed. *Id.*

Thus, under the Court's 1976 Order, the eligibility of unlisted villages throughout the State was subject to collateral attack by third parties holding federal grazing leases and, presumably, similar interests in

lands subject to selection by the villages. This ruling significantly affected the finality of administrative eligibility determinations, the finality of which is crucial to the effective and timely implementation of ANCSA.[1]

The federal defendant respectfully submits that the conclusions and rationale expressed by the Court in its recent Order moots the Court's prior assumptions and determinations regarding the nature of the plaintiffs' interests and their obligation to exhaust available administrative remedies. Specifically, the Court points out in its recent Memorandum and Order that Section 14(g) of ANCSA, 43 U.S.C.. § 1613(g), protects all valid existing rights in selected land, making the lands patented to the Natives subject to these rights. (Memorandum and Order, filed 10/16/78, p.4). That section provides in pertinent part:

> Where prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement (including a lease issued under 6(g) of the Alaska Statehood Act) has been issued . . . the patent shall contain provisions making it subject to the lease contract . . . .

The Court referenced Section 14(g) in its Memorandum and Order as a basis for its determination that plaintiffs' interests in state grazing leases would not be injured by the transfer to the village corporation of

---

[1] Concern over the impact of the 1976 ruling is not exclusive to federal defendant. Non-federal defendants filed a notice of cross-appeal on the issue of notice addressed in that ruling on December 27, 1978. Because the government views the import of the Court's most recent Order as having basically resolved the notice question, federal defendant deemed it appropriate to move for relief from the Court's initial Order in the interest of judicial economy.

lands subject to such leases. Precisely the same reasoning applies to the plaintiffs' interests in federal grazing leases. Those interests simply are not subject to injury by the transfer of lands to the village corporation because of the protective provisions of ANCSA, notably Section 14(g).

Following its discussions of ANCSA's protection of valid existing rights, the Court concluded:

> Until such time as such an injury can be alleged, there is no case or controversy under Article III between the plaintiffs Stratman and Burton and Leisnoi that would allow this Court to determine its eligibility as a village or the validity of its land selections. (Memorandum and Order, filed 10/16/78, p. 4)

While the Court's holding implicity [sic] applies to federal grazing leases as well as state grazing leases, federal defendant seeks clarification of this point because of the importance to it of preserving the finality of village eligibility determinations, and the need for protecting those determinations from collateral attack by third parties whose interests are not cognizably affected by said determinations.

Reading the Court's first Memorandum and Order in light of its subsequent Order then, the Government submits that plaintiffs are entirely precluded from challenging the Leisnoi eligibility determination because Section 14(g) of ANCSA resolves any case or controversy with respect to plaintiffs' rights as leaseholders. To the extent plaintiffs possess what would seen to be a sufficient property interest to required *Schroeder*-type notice, that interest is protected by Section 14(g) of ANCSA, which extinguishes any case or controversy as to that interest

or possible injury thereto. Interests of plaintiffs not protected by Section 14(g) are necessarily mere expectancies or perhaps hopes with respect to future leasehold renewal. By their very nature the latter interests are not legal contractual rights which are binding upon the lessor, or they would be covered by Section 14(g). Such interests are the same as, or akin to, the generalized economic interests of plaintiffs, which this Court has held are "much too speculative to create a case or controversy under Article III." (Memorandum and Order, filed 10/16/78, p.3)

Federal defendant submits that under the Court's reasoning as set forth in its Memorandum and Order of October 16, 1978, which takes into account the statutory mechanism within ANCSA for resolving conflicts between lessees of federal (or state) land and native corporations which subsequently select the same land, an Article III case or controversy has never existed with respect to plaintiffs' interests in the selected land, and that therefore the Court's 1976 ruling with respect to notice is moot.

Moreover, under the rationale adopted by the Court in its 1978 Order, the *Schroeder* case is no longer relevant to this dispute. At the heart of the Court's 1978 Order, is its recognition of ANCSA's internal mechanism for resolving conflicts between cognizable interests in Alaskan land. The condemnation statute which was the basis for the *Schroeder* action provides no such internal mechanism for protecting cognizable interests. The notice requirements of *Schroeder* may be necessary to protect interests which might otherwise be inadvertently extinguished because of the nature of *in rem* actions, such as condemnation actions. That policy is not applicable to the case at bar where plaintiffs' rights are automatically protected. Accordingly, federal defendant moves this Court for

relief from its 1976 ruling with respect to the notice requirements applicable to plaintiffs.

The specific relief requested by federal defendant is authorized by Civil Rule 60(b). It is not necessary to determine precisely the clause under which relief if proper as long as the Motion for relief under Rule 60(b) is made within the appropriate time period. 7 *Moore's Federal Practice* § 60.27[1], p. 346. In the instant case, categorization of the relief sought would probably place it within clause (6), the residual category. Relief sought under that clause is subject only to a "reasonable" time limitation. Although federal defendant seeks relief from an order entered over two years ago, the order did not become final until the Court entered judgment October 16, 1978. Moreover, the need for relief from the 1976 Order was not clear until the Court issued its 1978 Memorandum and Order. Federal defendant submits that its Motion is timely under the circumstances, and that the foregoing Memorandum sets forth adequate justification for the relief sought. Clarification of the Court's 1976 opinion in light of its 1978 Memorandum and Order will be of great benefit to defendant Secretary of the Interior, who is charged with the prompt administration of ANCSA. Accordingly, he respectfully requests that such clarification issue.

DATED this 30th day of January, 1979, at Anchorage, Alaska.

Respectfully submitted,

ALEXANDER O. BRYNER
United States Attorney

/s/ CYNTHIA L. PICKERING
Cynthia L. Pickering

Attorney
Land and Natural
Resources Division
U.S. Department of Justice

APPENDIX K

43 C.F.R. § 2650.7 (1994) Publication.

(d) For all land selections made under the Act, in order to give actual notice of the decision of the Bureau of Land Management proposing to convey lands, the decision shall be served on all known parties of record who claim to have a property interest or other valid existing right in land affected by such decision, the appropriate regional corporation, and any Federal agency of record. In order to give constructive notice of the decision to any unknown parties, or to known parties who cannot be located after reasonable efforts have been expended to locate, who claim a property interest or other valid existing right in land affected by the decision, notice of the decision shall be published once in the FEDERAL REGISTER and, once a week, for four (4) consecutive weeks, in one or more newspapers of general circulation in the State of Alaska nearest the locality where the land affected by the decision is situated, if possible. Any decision or notice actually served on parties or constructively served on parties in accord with this subsection shall state that any party claiming a property interest in land affected by the decision may appeal the decision to the Bureau of Land Appeals.

43 C.F.R. § 2651.2 (1994) Eligibility requirements.

(2) *Findings of fact and notice of proposed decision.* After completion of the investigation and examination of records and evidence with respect to the eligibility of a village listed in sections 11(b)(1) and 16(a) of the Act for land benefits, the Director, Juneau Area Office, Bureau of Indian Affairs, shall publish in the FEDERAL REGISTER and in one or more

newspapers of general circulation in Alaska his proposed decision with respect to such eligibility and shall mail a copy of the proposed decision to the affected village, all villages located in the region in which the affected village is located, all regional corporations within the State of Alaska and the State of Alaska. His proposed decision is subject to protest by any interested party within 30 days of the publication of the proposed decision in the FEDERAL REGISTER. If no valid protest is received within the 30-day period, such proposed decision shall become final and shall be published in the FEDERAL REGISTER. If the final decision is in favor of a listed village, the Director, Juneau Area Office, Bureau of Indian Affairs, shall issue a certificate as to the eligibility of the village in question for land benefits under the act, and certify the record and the decision to the Secretary. Copies of the final decisions and certificates of village eligibility shall be mailed to the affected village, all villages located in the region in which the affected village is located, all regional corporations within the State of Alaska, and the state of Alaska.

(4) *Action on protest.* Upon receipt of a protest, the Director, Juneau Area Office, Bureau of Indian Affairs, shall examine and evaluate the protest and supporting evidence required herein, together with his record of findings of fact and proposed decision, and shall render a decision on the eligibility of the Native village that is the subject of the protest. Such decision shall be rendered within 30 days from the receipt of the protest and supporting evidence by the Director, Juneau Area Office, Bureau of Indian Affairs. The decision of the Director, Juneau Area Office, Bureau of Indian Affairs, shall be published in the FEDERAL REGISTER and in one or more newspapers of general circulation in the State of Alaska and a copy of the

decision and findings of fact upon which the decision is based shall be mailed to the affected village, all villages located in the region in which the affected village is located, all regional corporations within the State of Alaska, the State of Alaska, and any other party of record. Such decision shall become final unless appealed to the Secretary by a notice filed within 30 days of its publication in the FEDERAL REGISTER in accordance with the regulations governing appeals set out in 43 CFR part 4, subpart E.

(5) *Action on appeals.* Appeals shall be made to the Board of Land Appeals in accordance with subpart E of part 4 of this title. Decisions of the Board on village eligibility appeals are not final until personally approved by the Secretary.

(8) *Action on application for eligibility.* Upon receipt of an application which appears to meet the criteria for eligibility, th Director, Juneau Area Office, Bureau of Indian Affairs, shall have a notice of the filing of the application published in the FEDERAL REGISTER and in one or more newspapers of general circulation in Alaska and shall promptly review the statements contained in the application. He shall investigate and examine available records and evidence that may have a bearing on the character of the village and its eligibility pursuant to this subpart 2651, and thereafter make findings of fact as to the character of the village. No later than December 19, 1973, the Director, Juneau Area Office, Bureau of Indian Affairs, shall make a determination as to the eligibility of the village as a Native village for land benefits under the act and shall issue a decision. He shall publish his decision in the FEDERAL REGISTER and in one or more newspapers of general circulation in Alaska and shall mail a copy of the decision to the representative or representatives of the village, all villages in the

region in which the village is located, all regional corporations, and the State of Alaska.

(9) *Protest to eligibility determination.* Any interested party may protest a decision of the Director, Juneau Area Office, Bureau of Indian Affairs, regarding the eligibility of a Native village for land benefits under the provisions of sections 11(b)(3)(A) and (B) of the Act by filing a notice of protest with the Director, Juneau Area Office, Bureau of Indian Affairs, within 30 days from the date of publication of the decision in the FEDERAL REGISTER. A copy of the protest must be mailed to the representative or representatives of the village, all villages in the region in which the village is located, all regional corporations within Alaska, the State of Alaska, and any other parties of record. If no protest is received within the 30-day period, the decision shall become final and the Director, Juneau Area Office, Bureau of Indian Affairs, shall certify the record and the decision to the Secretary. No protest shall be considered which is not accompanied by supporting evidence. Anyone protesting a decision concerning the eligibility or ineligibility of an unlisted Native village shall have the burden of proof in establishing that the decision is incorrect. Anyone appealing a decision concerning the eligibility or ineligibility of an unlisted Native village shall have the burden of proof in establishing that the decision is incorrect.

(10) *Action on protest appeal.* Upon receipt of a protest, the Director, Juneau Area Office, Bureau of Indian Affairs, shall follow the procedure outlined in paragraph (a)(4) of this section. If an appeal is taken from a decision on eligibility, the provisions of paragraph (a)(5) of this section shall apply.

APPENDIX L

PUBLIC LAW 92-203 -- DEC. 18, 1971

JOINT FEDERAL-STATE LAND USE PLANNING COMMISSION FOR ALASKA

Sec. 17. (b)(1) The Planning Commission shall identify public easements across lands selected by Village Corporations and the Regional Corporations and at periodic points along the courses of major waterways which are reasonably necessary to guarantee international treaty obligations, a full right of public use and access for recreation, hunting, transportation, utilities, docks, and such other public uses as the Planning Commission determines to be important.

(2) In identifying public easements the Planning Commission shall consult with appropriate State and Federal agencies, shall review proposed transportation plans, and shall receive and review statements and recommendations from interested organizations and individuals on the need for and proposed location of public easements: *Provided*, That any valid existing right recognized by this Act shall continue to have whatever right of access as is now provided for under existing law and this subsection shall not operate in any way to diminish or limit such right of access.

(3) Prior to granting any patent under this Act to the Village Corporation and Regional Corporations, the Secretary shall consult with the State and the Planning Commission and shall reserve such public easements as he determines are necessary.

APPENDIX M

THE ALASKA NATIVE CLAIMS SETTLEMENT ACT, PUB. L. NO. 92-203, 85 STAT. 688 (1971), codified at 43 U.S.C. § 1601, et seq.

§ 1601. Congressional findings and declaration of policy

Congress finds and declares that –

(a) there is an immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims;

(b) the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska;

§ 1610. Withdrawal of public lands

(b) List of Native villages subject to chapter; review; eligibility for benefits; expiration of withdrawals for villages; alternative eligibility; eligibility of unlisted villages

(2) Within two and one-half years from December 18, 1971, the Secretary shall review all of the villages listed in subsection (b)(1) hereof, and a village shall not be eligible for land benefits under section 1613(a) and (b) of this title, and any withdrawal for such village shall expire, if the Secretary determines that --

(A) less than twenty-five Natives were residents of the village on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; or

(B) the village is of a modern and urban character, and the majority of the residents are non-Native.

Any Native group made ineligible by this subsection shall be considered under section 1613(h) of this title.

(3) Native villages not listed in subsection (b)(1) hereof shall be eligible for land and benefits under this chapter and lands shall be withdrawn pursuant to this section if the Secretary within two and one-half years from December 18, 1971, determines that --

(A) twenty-five or more Natives were residents of an established village on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; and

(B) the village is not a modern and urban character, and a majority of the residents are Natives.

§1611. Native land selections

(a) Acreage limitation; proximity of selections and size of sections and units; waiver

(1) During a period of three years from December 18, 1971, the Village Corporation for each Native village identified pursuant to section 1610 of this title shall select, in accordance with rules established by the Secretary, all of the township or townships in which any part of the village is located, plus an area that will make the total selection equal to the acreage to which the village is entitled under section 1613 of this title. The selection shall be made from lands withdrawn by section 1610(a) of this title: *Provided*, That no Village Corporation may select more than 69,120 acres from lands withdrawn by section 1610(a)(2) of this title, and not more than 69,120 acres from the National Wildlife Refuge System, and not more than 69,120 acres in a National Forest: *Provided further*, That when a Village Corporation selects the surface estate to lands within the National Wildlife Refuge System or Naval Petroleum Reserve Numbered 4, the Regional Corporation, for that region may select the subsurface estate in an equal acreage from other lands withdrawn in section 1610(a) of this title within the region, if possible.

(2) Selections made under this subsection (a) of this section shall be contiguous and in reasonably compact tracts, except as separated by bodies of water or by lands which are unavailable for selection, and shall be in whole sections and, wherever feasible, in units of not less than 1,280 acres:

§ 1613. Conveyance of lands

(g) Valid existing rights preserved; saving provisions in patents; patentee rights; administration; proportionate rights of patentee

All conveyances made pursuant to this chapter shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this chapter, a lease, contract, permit, right-of-way, or easement (including a lease issued under section 6(g) of the Alaska Statehood Act) has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him.